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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY JONES,

Defendant and Appellant.

D051412

(Super. Ct. No. SCD203286)

APPEAL from a judgment of the Superior Court of San Diego County, Larrie R. Brainard, Judge. Affirmed in part and reversed in part.

A jury convicted Johnny Jones of one count of residential burglary and one count of attempted residential burglary. (Pen. Code,¹ §§ 459, 664, 667.5, subd. (c)(21).) The trial court found that Jones had suffered three prior serious felonies, 12 prior strikes and three prison priors. (§§ 667, subds. (a)(1), (b)-(i), 667.5, subd. (b), 1170.12.) The court sentenced Jones to 80 years to life in prison under the Three Strikes law.

¹ All statutory references are to the Penal Code unless otherwise indicated.

Jones appeals, challenging his sentence on three separate grounds. First, Jones contends that the trial court abused its discretion in declining his request to strike 11 of his prior strike offenses so that he could receive a more lenient sentence under the Three Strikes law. Second, Jones argues that his 80-year-to-life sentence constitutes cruel and unusual punishment in violation of the state and federal Constitutions. Third, Jones contends that the trial court erred by imposing and staying his prison prior enhancements, rather than striking them. As discussed below, we find Jones's first two contentions to be without merit. With respect to the third contention, the Attorney General concedes that the trial court erred and we agree. We consequently remand for the trial court to either strike or impose the sentencing enhancements for Jones's prison priors. In all other respects, the judgment is affirmed.

I

FACTS

A. *Governor Drive Burglary*

On March 30, 2006, at around 7:30 p.m., Marisa Roberto returned home from work to her house on Governor Drive in San Diego. As she entered the house, a man ran past her, through the living room, and out the sliding glass patio door at the back of the house. The man was holding something in his arms.

Roberto called 911. When police arrived, she informed them that her laptop computer and some jewelry were missing. Her dining room window was broken and there was mud strewn around.

The police searched the house and found a screwdriver in the backyard. The screwdriver did not belong to Roberto or her roommate. The police were able to recover DNA evidence from the screwdriver; later testing revealed that the DNA matched Jones's DNA.

At trial, Roberto stated that Jones's build was consistent with the person she encountered in her home; her home was dark, however, at the time she encountered the burglar and so she had been unable to see his face.

B. *Bay Park Attempted Burglary*

On July 2, 2006, Daniel Aguilar woke up in his home in the Bay Park area of San Diego and noticed that a window screen adjoining the backyard of his property had been removed and was lying on the ground. There was a cell phone next to the screen. The phone did not belong to Aguilar or anyone in his family.

A neighbor contacted Aguilar and mentioned that someone had broken into her home while her family was sleeping. When the police arrived to investigate the neighbor's burglary, Aguilar showed them the cell phone.²

Police located a piece of paper with a phone number and the label "MOMA" in the phone's battery compartment. An officer called the number and spoke to a women, identifying herself as Jean George. George said the phone belonged to her son, Jones. The phone contained a log of incoming and outgoing calls. The log showed calls to and

² Jones was charged with the burglary of the neighbor's residence but the jury was unable to reach a verdict on that charge.

from George's cell and home phone, and the home of Ira Barnes. Barnes testified that the phone number associated with the phone belonged to Jones who Barnes acknowledged lived with her periodically.

II

DISCUSSION

On appeal, Jones challenges his sentence on three separate grounds. We address each of his contentions separately, after detailing the sentence he received.

A. *Jones's Sentence*

At sentencing, Jones stood convicted of two felony offenses: one count of residential burglary (§§ 459, 460) and one count of attempted residential burglary (§§ 664, 459, 460). Based on Jones's prior criminal record consisting of 11 prior residential burglaries and two attempted residential burglary convictions, the trial court also found that Jones had suffered three serious felony priors (§§ 667, subd. (a)(1), 668, 1192.7(c)); 12 strike priors (§§ 667, subds. (b)-(i), 1170.12, 668); and three prison priors (§§ 667.5, subd. (b), 668).³

³ First degree burglary and attempted first degree burglary constitute "serious felonies" and strikes under California sentencing law (see §§ 667, subd. (d)(1), 1192.7, subd. (c)(18), (39)); the discrepancy between the number of strikes (12) and the number of serious felonies (three) is due to the fact that enhancements for serious felonies, but not strikes, are limited to "charges brought and tried separately." (§ 667, subd. (a)(1).) Jones committed his first burglary prior to the enactment of the Three Strikes law.

During the trial regarding Jones's prior offenses, Jones argued that there was insufficient evidence that certain of his prior burglary offenses were first degree burglaries. The trial court rejected this contention and Jones does not challenge its ruling on appeal.

First degree burglary (i.e., burglary of an inhabited dwelling) is normally punished by imprisonment in state prison for two, four or six years. (§§ 460 [defining first degree burglary as burglary of "an inhabited dwelling house"], 461 [listing punishments].)

Attempted first degree burglary is normally punished by half the term of imprisonment for first degree burglary. (§ 664.) Jones's prior criminal record, however, required that he be sentenced for the residential burglary and attempted residential burglary offenses under the Three Strikes law. (§ 667, subd. (c).)

To avoid the sentence mandated by the Three Strikes law, Jones's attorney filed a motion asking the trial court to strike 11 of Jones's prior strikes and to sentence him to an indeterminate sentence as a second strike offender, thereby providing some possibility for release on parole. At a hearing on the motion, the trial court denied the request, noting Jones's lengthy criminal record and the absence of any indication that Jones would ever cease burglarizing homes. The trial court then sentenced Jones to 80 years to life in prison. The sentence consisted of 25 years to life for each conviction, as mandated by the Three Strikes law (§ 667, subd. (e)(2)(A)(ii), 2(B)), plus an additional 15 years on each conviction under section 667, subdivision (a)(1) for Jones's three serious felony priors. The resulting sentences of 40 years to life on each count were ordered to run consecutively. (See § 667, subd. (c)(6).)

B. *The Trial Court Did Not Abuse Its Discretion in Denying Jones's Motion to Strike His Prior Convictions*

Jones contends that the trial court abused its discretion by denying his motion to strike 11 of his 12 prior strikes. In support of this contention, Jones highlights a number

of mitigating factors, including the absence of violence or street gang activity in Jones's criminal record, his "advancing age" (Jones is 44) and indications that he suffers from a learning disability. Jones contends that the trial court failed to give sufficient weight to these mitigating factors and adds that "[i]t makes absolutely no societal sense to commit [him] to prison for what would effectively be a life sentence without the possibility of parole for a history of nonviolent behavior." As discussed below, we can find no grounds for reversal.

There is nothing in the sentencing record that suggests the trial court abused its discretion in imposing the sentence dictated by the Three Strikes law. The question of whether Jones's sentence, and the sentences of the numerous Three Strikes offenders sentenced to life terms each year in California, ultimately make "societal sense" is for the Legislature and the voters, and to a lesser extent the trial courts. It is not, however, a basis for reversal on appeal.

A trial court may strike a finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony (i.e., a strike) on its "own motion or upon the application of the prosecuting attorney . . . in furtherance of justice." (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*), citing *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) In determining whether to strike a strike, the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as

though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.)

The trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary." (Id. at p. 376.) Second, "[a]n appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge," and consequently, the trial court's "decision will not be reversed merely because reasonable people might disagree." (Id. at p. 377.) Taken together, these two precepts establish the overarching principle on review that "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

Applying these principles we conclude that the trial court did not abuse its discretion.

As Jones himself recognizes, he has a lengthy criminal record that "extends over a twenty-five year period." Leading up to the instant offense, Jones had been convicted on six separate occasions of serious criminal offenses. In 1981, Jones committed a residential burglary, breaking the window of a residence and taking several gold necklaces. Jones was sentenced to 365 days in county jail and placed on probation. In 1983, Jones was convicted of six counts of residential burglary and two counts of attempted residential burglary after he burglarized a series of apartments. Jones was

sentenced to six years eight months in state prison. In 1989, Jones was convicted of residential burglary after robbing a home of a television, two VCR's and a revolver. Jones was sentenced to four years in prison. Again in 1989, Jones was convicted of three counts of burglary. Jones was sentenced to four years in prison. In 1996, Jones was convicted of receiving stolen property, theft and attempted theft arising out of another residential burglary. Jones was sentenced to six years in prison. In 2003, Jones was convicted of driving under the influence and driving without a license. He was sentenced to 180 days in jail. In 2006, Jones committed the instant offenses. Jones's record also includes numerous parole and probation violations.

The sentencing record summarized in the preceding paragraph supports a reasonable conclusion that Jones is a "career criminal" — precisely the type of offender that the Three Strikes law is intended to either deter or, if deterrence is not achieved, incapacitate. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338 ["extraordinary must be the circumstance by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack"].) Indeed, "[b]ecause the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit'" of the Three Strikes law, the circumstances where an appellate court would find an abuse of discretion when the trial court declined to strike a career criminal's prior strikes "must be even more extraordinary." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Given Jones's criminal record, which demonstrates a determination, despite repeated and increasing periods of

incarceration, to engage in residential burglaries and other serious offenses, we cannot conclude that extraordinary circumstances are present here — in the form of mitigating circumstances or otherwise — which would indicate that the trial court abused its discretion in concluding that Jones did not fall "outside the [Three Strikes] scheme's spirit." (*Williams, supra*, 17 Cal.4th at p. 161; *People v. Philpot* (2004) 122 Cal.App.4th 893, 906 [no abuse of discretion in declining to strike a strike where the "defendant consistently committed criminal offenses for the past 20 years," and "[h]is conduct as a whole was a strong indication of unwillingness or inability to comply with the law"].)

There also is no basis in the record to conclude that the trial court failed to give sufficient weight to the mitigating factors highlighted by Jones on appeal. Each of these factors was before the trial court; they were simply, in that court's view, outweighed by the factors in aggravation. As the trial court's determination in this regard is not such that "no reasonable person could agree with it," there was no abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

C. *Jones's Sentence Does Not Constitute Cruel and Unusual Punishment*

Jones contends that his sentence also amounts to cruel and unusual punishment under both the federal and state constitutions because the life sentence he received is overwhelmingly disproportionate to the crimes of residential burglary and attempted residential burglary. We disagree.

The California Constitution prohibits "[c]ruel *or* unusual punishment," and we construe this provision separately from its counterpart in the federal Constitution. (Cal. Const. art. I, § 17, italics added; *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) A

punishment violates this provision of the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch*, at p. 424.)

In *Lynch, supra*, 8 Cal.3d 410, our Supreme Court identified three "techniques" that aid courts in determining whether a particular punishment constitutes cruel or unusual punishment: (1) reviewing the nature of the offense and/or the offender, with particular attention to the degree of danger both present to society; (2) comparing the challenged punishment to penalties for worse offenses in the same jurisdiction; and (3) comparing the challenged punishment to penalties for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)

With respect to the first of these techniques, Jones argues that the absence of actual instances of violence in his record demonstrate that he is not such a danger to society as to warrant a life term of imprisonment. We are unconvinced. While we recognize that, all things being equal, violent offenses present a greater danger to society than non-violent offenses, Jones's crime of choice — residential burglary — is a gravely serious offense. (See *People v. Fond* (1999) 71 Cal.App.4th 127, 131 [noting that residential burglary "violates the victim's need to feel secure from personal attack," and "[p]eople simply need some place where they can let down their guard and where they can sleep without fear for their safety"]; cf. §§ 667.5, subd. (c)(21) [defining residential burglary as crime of violence if it is charged and proved that another person other than an accomplice was present during the commission of the burglary], 1192.7, subd. (c)(1) [defining residential burglary and attempted residential burglary as "'serious

felon[ies]''[.]) In addition to the psychic and emotional trauma of a home invasion, every residential burglary occasions the danger that the burglar will encounter a resident, neighbor or police and violence will ensue. (See *People v. Gauze* (1975) 15 Cal.3d 709, 715 [recognizing that ''[b]urglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation — the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence''].) In addition, Jones is being punished not merely for the current offenses, but also ''because of his recidivism.'' (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1432; *People v. Stone* (1999) 75 Cal.App.4th 707, 715 [''The basic fallacy of appellant's argument lies in his failure to acknowledge that he 'is not subject to a life sentence merely on the basis of his current offense but on the basis of his recidivist behavior. Recidivism in the commission of multiple felonies poses a manifest danger to society[,] justifying the imposition of longer sentences for subsequent offenses''].) Thus, our analysis of the nature of the offenses (i.e., two separate criminal incidents resulting in a conviction for residential burglary and for attempted residential burglary) and the offender (i.e., Jones's recidivism) does not support a conclusion that the punishment imposed is cruel or unusual.

With respect to the second *Lynch* technique, Jones points out that the punishment he received is harsher than the punishment prescribed by California law for all but a handful of the most heinous crimes. This is only true, however, when Jones's offense is compared to that of first time offenders. Jones's sentence is similar to the sentences

received by recidivists under the Three Strikes law throughout the state, and thus is not inconsistent with the general criminal sentencing scheme. (See *People v. Romero*, *supra*, 99 Cal.App.4th at p. 1433 [recognizing that in the Three Strikes context, ""it is illogical to compare [defendant's] punishment for his 'offense,' which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons""].)

With respect to the third *Lynch* technique, Jones argues generally that California's recidivist sentencing scheme is the harshest in the country. (See *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 772 (*Ramirez*) [noting State's concession that the Three Strikes statute ""is the most stringent in the nation""].) This may well be, but it does not follow that all California recidivist sentences are therefore unconstitutional. ""That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide.'"" (*People v. Romero*, *supra*, 99 Cal.App.4th at p. 1433.)

Our analysis is similar under the federal constitution. The Eighth Amendment to the federal Constitution forbids "cruel and unusual punishments," and contains a "'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*).) In *Ewing*, the United States Supreme Court applied this proportionality principle in reviewing the constitutionality of a 25-year-to-life sentence

for grand theft (theft of three golf clubs worth \$1,200) under California's Three Strikes law. (*Id.* at pp. 17, 20.) The high court emphasized that "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." (*Id.* at p. 29.) The court concluded that in light of Ewing's "numerous misdemeanor and felony offenses," his having "served nine separate terms of incarceration" for "serious felonies including robbery and three residential burglaries" and his having "been convicted of . . . and committed most of his crimes while on probation or parole," a life sentence for stealing golf clubs was not cruel and unusual punishment. (*Id.* at p. 30.)

The facts of Jones's case are similar in many respects to those addressed by the federal Supreme Court in *Ewing, supra*, 538 U.S. 11. In addition, Jones's instant offenses, residential burglary and attempted residential burglary (involving two distinct incidents) are significantly more weighty than the single grand theft conviction at issue in *Ewing*. Consequently, the *Ewing* decision strongly suggests that Jones's sentence was not cruel and unusual under the Eighth Amendment to the United States Constitution. (See *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 ["Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction"].)

Jones also cites a handful of federal court opinions reversing Three Strike sentences in habeas corpus proceedings to support his argument. These decisions are factually distinct from the instant case and, in any event, "we are not bound by decisions

of the lower federal courts, even on federal questions." (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3; see *Ramirez, supra*, 365 F.3d at p. 756 [reversing 25-year-to-life sentence imposed on California recidivist for petty theft with a prior]; *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, 967 [remanding for further factual development where California recidivist received 26-year-to-life sentence for making a false statement on a driver's license application]; *Banyard v. Duncan* (C.D.Cal. 2004) 342 F.Supp.2d 865, 867 [reversing sentence for California recidivist sentenced to 25 years to life for "possessing a fraction of a gram of rock cocaine"]; *Duran v. Castro* (E.D.Cal. 2002) 227 F.Supp.2d 1121, 1124, 1125 [reversing sentence for California recidivist sentenced to 25 years to life for possession of 1.55 grams of heroin].)

In sum, after analyzing Jones's sentence under each of the *Lynch* techniques and under federal constitutional authority, we conclude that Jones's punishment does not shock the conscience or otherwise offend fundamental notions of human dignity. Given Jones's repeated residential burglary and other serious convictions over a 25-year period, there is nothing in the state or federal Constitution that bars the Legislature (and the voters) from attempting to punish and incapacitate Jones, while at the same time deterring others of like mind, by mandating a life term of imprisonment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359 ["When faced with recidivist defendants . . . , California appellate courts have consistently found the Three Strikes law is not cruel and unusual punishment"]; *People v. Cluff* (2001) 87 Cal.App.4th 991, 997 ["courts have determined that, as a general matter, the punishment imposed by California's Three Strikes law is not

so disproportionate that it violates the prohibition against cruel or unusual punishment"].)⁴

D. *The Trial Court Erred by Staying the Prison Priors*

At Jones's sentencing hearing, the trial court did not address its earlier finding that Jones had three prison priors. The abstract of judgment, however, states that the sentencing enhancements for the prison priors were imposed but stayed. The minute order for the sentencing hearing states that the one-year sentence enhancements for each of the prior prison enhancements were "stayed per [section]654."

The parties agree that it was erroneous to stay the sentence enhancement on the prior prison findings. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["Once the prior prison term is found true within the meaning of section 667.5[, subd.](b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken"].)

The parties also agree that the trial court had the discretion to either strike or impose the

⁴ The sole California case that Jones relies on for his argument, *People v. Carmony* (2005) 127 Cal.App.4th 1066, is distinguishable. In *Carmony*, the court of appeal reversed a 25-year-to-life sentence imposed for a defendant's failure to reregister as a sex offender, emphasizing that the defendant had in fact registered, and that the reregistration was a purely technical violation with no practical effect. (*Id.* at p. 1078.) "Accordingly, the requirement that defendant reregister within five days of his birthday served no stated or rational purpose of the registration law and posed no danger or harm to anyone." (*Id.* at p. 1073.) The court concluded, "Because a 25-year recidivist sentence imposed solely for failure to provide duplicate registration information is grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity, it constitutes cruel and unusual punishment under both the state and federal Constitutions." (*Ibid.*) In the instant case, Jones's felony convictions for residential burglary and attempted residential burglary are a far cry from the mere technical violations that "served no stated or rational purpose" at issue in *Carmony*. (*Ibid.*)

one-year enhancements for the prior prison terms. Jones asks this court to strike the enhancements because, he contends, a remand would be pointless, as the trial court's preference is clear from the documentary record. The Attorney General requests that we remand the case for resentencing so that the trial court can impose (or strike) the enhancements.

While we are sympathetic to Jones's contention that the trial court probably intended to strike the prison priors, a sentencing court is required to state its reasons in exercising its discretion to strike or impose an otherwise mandatory term for a prison prior. (§ 1385, subd. (a); *People v. Jordan* (2003) 108 Cal.App.4th 349, 368.) Because we cannot assume the reasons for striking prison prior enhancements, we are obligated to remand the case to the lower court with directions to exercise its discretion to either strike or impose the two prior prison term enhancements.

DISPOSITION

The case is remanded with directions to the trial court to strike or impose the prior prison term enhancements, to amend the abstract of judgment to reflect its decision, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.